BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEVE LOGAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 206,790
FRY-WAGNER MOVING & STORAGE	)	
Respondent	)	
AND	)	
	)	
VANLINER INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Robert H. Foerschler on February 20, 1997. The Appeals Board heard oral arguments on August 19, 1997.

APPEARANCES

Claimant appeared by his attorney, Kip A. Kubin of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, Joseph R. Ebbert of Kansas City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded benefits for a 32.75 percent work disability. Respondent contends claimant has failed to establish any permanent injury because the only disability or impairment results from a preexisting condition. If benefits are awarded for permanent disability, respondent contends the Award should be limited to functional impairment because, according to respondent, claimant is earning a wage which is 90 percent or more of his preinjury wage. Respondent and claimant both disagree with the average weekly wage found by the Administrative Law Judge. Claimant also contends that the Administrative Law Judge has erred in calculating the nature and extent of disability because he has made an error in the finding regarding loss of ability to perform tasks. The issues on appeal, therefore, are as follows:

(1) The nature and extent of claimant's disability, if any.

(2) The amount of claimant's average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that claimant is entitled to benefits based upon a 52 percent work disability. The Appeals Board also finds that claimant's average weekly wage at the time of accident was $584.80. These findings and conclusions are made for the reasons stated below.

Claimant injured his back on April 9, 1994, while pushing a loaded skid on a jack into a truck . He heard something snap in his back. The injury occurred on a Saturday night and the following Sunday morning he went to a walk-in health clinic in Olathe, Kansas, for examination and treatment. On Monday morning he reported the injury to his supervisor and was sent to Business & Industry Health Clinic where he underwent physical therapy. He was subsequently seen by a series of doctors, several of whom recommended that he undergo surgery. Claimant declined the surgery and returned to work for respondent as an assistant dispatcher, a position which paid a salary of $23,500 per year.

Claimant was terminated from his employment with respondent in November 1995 and was unemployed until April of 1996. The reason for the termination was not addressed by the parties. Beginning April 1, 1996, claimant went to work as a self-employed contractor for One Hour Delivery, a courier service. In this position claimant earned $125 per day, less expenses.

The Appeals Board first finds claimant did suffer permanent injury as a result of the on-the-job accident in the course of his employment with the respondent. This conclusion is based upon claimant's testimony that this incident marked the onset of symptoms in his low back. This conclusion is also supported by the testimony of Edward J. Prostic, M.D.

Dr. Prostic gives his opinion that claimant sustained a 22.5 percent permanent partial impairment of function as a result of the injury of April 9, 1994. The Appeals Board recognizes that Jeffrey T. MacMillan, M.D., opined that the claimant's impairment resulted from preexisting degenerative disc disease. As claimant points out, Dr. MacMillan did not have the benefit of the medical records from previous treatment. Dr. MacMillan acknowledges that claimant gave him a history indicating he had not had pain prior to the April 9, 1994, accident. The Appeals Board finds the record as a whole does not support Dr. MacMillan's conclusion, and the Appeals Board further finds that claimant did suffer permanent disability as a result of the April 9, 1994, accident.

The dispute concerning the nature and extent of claimant's disability turns primarily on the pre- and post-injury average weekly wage. For injuries after July 1, 1993, K.S.A. 44-510e provides two prongs for the measure of work disability. The wage loss prong is determined by comparing the pre- and post-injury wage. The difference, converted to a percentage, is then averaged together with the task loss prong. The task loss is the loss of ability, again converted to a percentage, to perform tasks performed in the previous fifteen years of work. The task loss must be based on the opinion of a physician. K.S.A. 44-510e also provides that a claimant's disability should be limited to his or her functional impairment if after the accident he/she earns 90 percent or more of the pre-injury wage.

Respondent contends claimant did, after the injury, earn a wage equal to 90 percent or more of his pre-injury wage. Both the pre-injury wage and the post-injury wage are in dispute.

At the time of the accident, respondent paid claimant $10.07 per hour for loading/unloading and other work other than driving. Claimant was paid 23¢ per mile for driving and received no hourly pay for driving. Claimant was not guaranteed 40 hours per week of the hourly type of work. For some of the 26 weeks preceding the date of accident, claimant worked more than 40 hours on the clock. In fact, he did so more than half of those weeks. In other cases, he worked fewer than 40 hours on the clock. For hours on the clock over 40, claimant earned overtime pay.

Claimant contends that he is a full-time hourly employee, and as such, his average weekly wage should be computed in accordance with K.S.A. 44-511(a)(5). That subsection states in pertinent part:

> The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.

Claimant cites, as additional support for his position, the testimony of Susan Gerfen. She testified, among other things, that claimant was considered a full-time employee.

Respondent, on the other hand, contends that claimant's average weekly wage should be computed in accordance with subsection (b)(5) of K.S.A. 44-511. That subsection provides a method for computing the average weekly wage of employees paid on any basis other than by the week, month, year, or hour:

> If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specified job, or on any other basis where the money rate is not fixed by the week, month, year or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection.

In the Board's view, neither subsection fits the present circumstances precisely. Claimant is paid both by the hour and otherwise based upon miles driven. The Appeals Board concludes that the provisions of subsection (b)(5) should be applied. Application of this subsection more accurately reflects the amount he actually earned. In addition, in accordance with the language of subsection (b)(5), the claimant's total wage is not "fixed by the week, month, year or hour . . . ."

If claimant's pre-injury average weekly wage is computed in accordance with subsection (b)(5), he had an average weekly wage at the time of the accident of $584.80. This wage is calculated by averaging the total amount earned, including mileage, for the 26 weeks preceding the accident. This includes $567.43 per week in regular pay and overtime. He also had $17.37 per week in fringe benefits.

To determine the wage prong of work disability, the pre-injury wage must be compared to the post-injury wage. As indicated, claimant was paid at the rate of $23,500 per year in a position as a dispatcher. During that period of time his average weekly wage would be $451.92 computed in accordance with K.S.A. 44-511(b)(1). This would be less than 90 percent of the pre-injury average weekly wage. As previously indicated, he was also unemployed for a period of approximately six months.

In April 1996 claimant went to work for a courier service. There he earned $125 per day but was required to pay his own expenses. The expenses included gasoline and maintenance of his vehicle, as well as insurance and certain other expenses, which the Board finds should be deducted from the $125 per day or $625 per week. The Board notes nothing in the statutes directs what period is to be used to calculate the post-injury average weekly wage. If the period working as a dispatcher were used, claimant was not earning 90 percent of his pre-injury wage. Obviously the same is true for the time he was unemployed. For purposes of this Award, the Board has used the wage with the courier service to compare to the pre-injury wage. This was the last job and does not appear chosen to manipulate the wage. The Board has not separately calculated the wage difference for the period of employment as a dispatcher or for the period of unemployment. Both would produce a different number of weeks of benefits to be paid. However, because of the calculation method the Board uses when there is a change in work disability, recalculating the disability on the basis of the latest work disability and giving credit for prior payments, there would be no net difference in the permanent partial benefits if the work disability were calculated separately for each period of employment. Bohanan v. USD 260, Docket No. 190,281 (Nov. 1995).

Exhibit 2 to the regular hearing summarizes the income and expenses for claimant's work at the courier service. Claimant testified that these were for a 26-week period from April 1 through September 20, 1996, the first 26 weeks of his new position. Also attached are receipts for gasoline expenses. Respondent contends claimant is not entitled to deduct expenses and that the records do not adequately substantiate the expenses listed in Exhibit 2. The Board agrees in part. Certain of the expenses are not supported by the evidence. However, the record does appear to adequately substantiate certain of those expenses. The expenses the Board considers to be appropriately deducted include the following:

Advertising sign for the truck	$200.00
Gasoline	$663.57
Liability insurance	$181.11
Registration and property tax for the vehicle	$304.00
Office expenses	$192.55
Rental of two-way radio	$689.00
Uniform expense	$233.98
Vehicle maintenance	$703.63
Vehicle repairs	$641.48
Car rental	$ 42.05

The gasoline expense used above was arrived at by deducting charges for cigarettes and other non-gasoline items on the receipts. The Board has excluded from these expenses the expense for bookkeeping by claimant's wife because the evidence indicates it has not been paid.

The Appeals Board has excluded from the total list of expenses certain expenses which are not either adequately explained in the record or otherwise do not appear to be appropriately deductible from the income. These include:

Entertainment expense which is not adequately justified	$ 649.98
Meals are not properly deductible as a business expense by an independent contractor any more than they would be for a salaried employee as they are an expense both must incur	$1,300. 00
Office expenses for bookkeeping services performed by the claimant's wife. The record reflects that those have not been paid.	$ 650.00

The record shows total gross income for the same 26 weeks was $15,114.68. The income less expenses of $3,851.87 gives a net income of $11,262.81 or $433.21 per week. When the $433.21 is compared to $584.80 per week pre-injury wage, claimant has a 26 percent loss in wage.

Claimant also challenges the finding by the Administrative Law Judge relating to the task loss prong of work disability. The only physician's task loss opinion in the record was that of Dr. Edward J. Prostic based on a list of tasks prepared by Mr. Gary Weimholdt. The opinion was that claimant has lost the ability to perform 77.78 percent of the tasks he performed in the relevant work history. That opinion is not improbable or unreasonable. The Board, therefore, finds the task loss to be 77.78 percent.

Averaging together the wage loss and task loss, as required by K.S.A. 44-510e, the Board finds claimant has a 52 percent work disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler, dated February 20, 1997, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Steve Logan, and against the respondent, Fry-Wagner Moving & Storage, and its insurance carrier, Vanliner Insurance Company, for an accidental injury which occurred April 9, 1994, and based upon an average weekly wage of $584.80 for 10 weeks of temporary total disability compensation at the rate of $313.00 per week or $3,130.00, followed by 215.80 weeks at the rate of $313.00 per week or $67,545.40, for a 52% permanent partial work disability, making a total award of $70,675.40.

As of September 30, 1997, there is due and owing claimant 10 weeks of temporary total disability compensation at the rate of $313.00 per week or $3,130.00, followed by 171.43 weeks of permanent partial compensation at the rate of $313.00 per week in the sum of $53,657.59 for a total of $56,787.59, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $13,887.81 is to be paid for 44.37 weeks at the rate of $313.00 per week, until fully paid or further order of the Director.

The Appeals Board approves and adopts all other orders by the Administrative Law Judge not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of September 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kip A. Kubin, Overland Park, KS
Joseph R. Ebbert, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director